**ORIGINAL**

DOCKET FILE COPY ORIGINAL

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



| | | |
|---|---|---|
| In the Matter of<br><br>Petition of US West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services | )<br>)<br>)<br>)<br>)<br>)<br>) | CC Docket No. 98-26 |

**COMMENTS OF**
**ICG TELECOM GROUP, INC.**

Cindy Z. Schonhaut
Senior Vice President of Government Affairs & External Affairs
ICG Communications, Inc.
161 Inverness Drive
Englewood, CO 80112
(303) 414-5464

Albert H. Kramer
Michael Carowitz
Valerie M. Furman
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for ICG Telecom Group, Inc.

April 6, 1998

## SUMMARY

US West argues in its petition that certain provisions set forth in Sections 251 and 271 of the Telecommunications Act of 1996 (the "Act"), primarily those provisions associated with the availability of unbundled network elements, as applied to access to the Internet backbone, and the prohibition against carrying traffic across in-region LATA boundaries, should not apply to interLATA transport of packet-switched data.

ICG submits that US West's petition amounts to another stance in its full court press against having to comply with the local competition requirements of Section 251. US West's petition is nothing short of a calculated attempt to leapfrog directly into the provision of in-region interLATA service for a substantial and growing portion of US West's total regulated business. US West seeks to make an end-run around statutory requirements that are at the heart of the deregulatory, pro-competitive environment that Congress envisioned when it enacted the Act.

The Act gives each RBOC its own in-region "homework" assignment with respect to interconnection, unbundling, and resale. The Act further provides that an RBOC that submits its completed homework assignment correctly is eligible for a passing grade and may "graduate" to providing in-region interLATA service. US West has not yet even come close, however, to completing its homework assignment and receiving a passing grade. Given this reality, there is no possible way that US West can claim it is eligible to graduate at this time. At best, US West would get an "incomplete" at this juncture.

US West's petition also represents an attempt to shift its focus — and that of the Commission — away from US West's local competition obligations, set forth in Section 251, to issues that allow the RBOC to maximize profits at the expense of its would-be competitors and their potential customers. Given its consistent inability to meet the requirements of Section 251, whether intentional or not, US West should not be permitted to divert its energy, capital, and other resources to new projects, such as those outlined in its petition.

ICG recites here the specific details of its own experiences with US West's shortcomings to underscore the lack of progress and foot dragging with which would-be competitors continue to meet, including: (1) consistent legal delays; (2) points of interconnection; (3) Operations Support System; (4) performance standards; (5) number portability; (6) discriminatory practices; (7) resale; and (8) network reliability.

US West has not made the requisite showing for the grant of a waiver. Nor has US West come close to making a case that is compelling enough to warrant forbearing from imposing regulatory restrictions across the entire industry, which is what "forbearance" would accomplish. Because US West has not made a showing that it is complying with the requirements of the Act, particularly in the face of contrary evidence submitted by ICG, the Commission should deny the relief sought by US West in its petition.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Petition of US West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services | ) | CC Docket No. 98-26 |

## COMMENTS OF ICG TELECOM GROUP, INC.

Pursuant to the Commission's Public Notice, DA 98-469, released March 6, 1998, ICG Telecom Group, Inc. ("ICG"), hereby respectfully submits its comments regarding US West Communications, Inc.'s ("US West") Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services ("US West Petition")[1] in which US West requests that the Commission "forbear" from imposing a number of regulatory restrictions that US West claims "frustrate the deployment to rural America of advanced telecommunications facilities."[2] US West argues that certain provisions set forth in Sections 251 and 271 of the Telecommunications Act of 1996 (the "Act"), primarily those provisions associated with the availability of unbundled network elements, as applied to access to the Internet backbone, and the prohibition against carrying traffic across in-region LATA boundaries, should not apply to interLATA transport of packet-switched data. In its

[1] Petition of US West Communications, Inc. for Relief from Regulatory Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26, filed February 25, 1998.

[2] Id. at i.

petition, US West requests that the Commission relieve it from four regulatory "burdens": (1) the bar on building and operating cell- and packet-switched data network that cross local access and transport area ("LATA") boundaries; (2) the restriction on interLATA data transport incident to providing digital subscriber line services; (3) the unbundling obligations for non-bottleneck data facilities; and (4) the duty to offer competitive data services to resellers at a discount.[3]

ICG, as the largest "facilities-based" competitive local exchange carrier ("CLEC") that is not affiliated with a major interexchange carrier ("IXC"), has an interest in these proceedings. ICG is a leading national CLEC with extensive fiber-optic networks. ICG offers local, long distance and enhanced telephony and data services in the states of California and Colorado, as well as the Ohio Valley and parts of the Southeastern United States.

On January 22, 1998, ICG merged with NETCOM On-Line Communication Services, Inc. ("NETCOM"), a leading provider of Internet services. NETCOM is one of the leading Internet services providers in the country, and as of December 31, 1997, was providing service to approximately 540,000 customers and over 12, 000 professional businesses.

Although US West argues that it is neither asking for complete deregulation of the technologies inherent in its request for relief nor attempting to avoid its obligation to make

---

[3] Id. at 4.

bottleneck facilities available to its CLEC competitors,[4] ICG submits that US West's petition amounts to another stance in its full court press against having to comply with the local competition requirements of Sections 251. Further, US West's petition is nothing short of a calculated attempt to leapfrog directly into the provision of in-region interLATA service for a substantial and growing portion of US West's total regulated business. In this guise, US West seeks to make an end-run around statutory requirements that are at the heart of the deregulatory, pro-competitive environment that Congress envisioned when it enacted the Act.

* * * * *

ICG continues to maintain that the Section 271 interLATA checklist "carrot" is one of the few effective levers available for the Commission to use in prying open the local RBOC monopoly. Therefore, it is critical to ensure that use of this lever be maximized consistent with the terms of the statute. In simple terms, the Act gives each RBOC its own in-region "homework" assignment with respect to interconnection, unbundling, and resale. The Act further provides that an RBOC that submits its completed homework assignment correctly is eligible for a passing grade and may "graduate" to providing in-region interLATA service. The scope of the RBOCs' homework assignment is clear and unambiguous — the RBOCs must open their in-region doors to local competition by facilitating interconnection, allowing resale, and offering unbundled network elements ("UNEs"). As documented below, however, US West has not yet even come close to

[4] Id.

completing its homework assignment and receiving a passing grade. Given this reality, there is no possible way that US West can claim it is eligible to graduate at this time. At best, US West would get an "incomplete" at this juncture.

US West's petition also represents an attempt to shift its focus — and that of the Commission — away from US West's local competition obligations, set forth in Section 251, to issues that allow the RBOC to maximize profits at the expense of its would-be competitors and their potential customers. Given its consistent inability to meet the requirements of Section 251, whether intentional or not, US West should not be permitted to divert its energy, capital, and other resources to new projects, such as those outlined in its petition. Under the Communications Act, the RBOC "students" are not permitted to choose their assignments, just as they are not allowed to grade themselves. US West must do what the law requires before proceeding to other energy-and-resource-diverting projects. For these reasons, ICG urges the Commission to deny US West's petition.

## I. US WEST HAS NOT MET THE PREREQUISITES TO RECEIVE THE RELIEF IT REQUESTS

To keep the focus on the local competition that the Act requires, ICG points out a significant number of specific steps that US West should take — *is required to take* — before the Commission should consider any petition for relaxation of the rules to which the RBOCs are required to adhere. US West's failure to comply with many of the statutory requirements has been pointed out previously and repeatedly by those, including ICG, with first-hand experience with US West's practices (or lack thereof, as the case may be). ICG associates itself with the comments of other parties that make legal and policy arguments about why it is inappropriate to grant US West the relief it requests. For its part, ICG recites here the specific details of its own experiences with US West's shortcomings to underscore the lack of progress and foot dragging with which would-be competitors continue to meet.

**Consistent Legal Delays**. Rather than expending so much time and effort — including that of its would-be competitors who must ensure that the Commission has a full picture of the lack of momentum in local competition — in trying to circumvent the requirements of the Act, US West should devote itself to completing its statutory "assignment" and getting its own house in order before taxing the Commission's limited resources with another paper-intensive proceeding that will do little to advance base-line local competition. ICG is concerned that given US West's consistent inability to meet the requirements of Section 251, whether intentional or not, the Commission should not permit US West to divert its energy, capital, and other resources to new projects, such as those outlined in its petition. US West is simply using its petition for "relief" as an excuse to begin shifting its attention away from its obligations under Section 251, just as local competition struggles to take root, to issues that are more consistent with US West's self interest and far less significant to the creation of a competitive telecommunications marketplace that will benefit all Americans.[5]

[5] US West's competitors must also devote substantial capital, in addition to their energy and other resources, to participate in these proceedings, instead of investing in their networks in a way that will keep the development of local competition on schedule.

For example, ICG and other CLECs have encountered substantial delays in their interconnection negotiations with US West, which were the subject of petitions for arbitration by ICG, as well as by AT&T, MCI Telecommunications, MFS Communications, and Teleport Communications Group. The arbitration petitions were consolidated by the Colorado Public Utilities Commission ("Colorado PUC"). Although US West continued to stall the Colorado proceeding, the Colorado PUC in the end forced US West to sign an interconnection agreement with ICG to alleviate the log jam resulting from the inaction on the part of US West. US West requested reconsideration of the Colorado PUC's order, which was denied, and then sued both the Colorado PUC and the parties to the arbitration decision in both state and federal court in apparent retaliation for being forced to permit local competition to proceed on schedule.

US West will undoubtedly contend that it cannot be penalized for asserting its legal rights, but ICG's concern is that the assertion of these rights, whether appropriate or not, impacts how local competition develops. The objective result of asserting every conceivable legal right, as US West is well aware, is to slow the development of local competition to a snail's pace, at best.

In another example of an undue legal delay, US West has attempted to shift its cost of building out its network to competitors through the Interconnection Cost Adjustment Mechanism ("ICAM"). US West has filed petitions in several states seeking to recover "start up" costs associated with: (1) development of interfaces to allow CLECs access to US West's Operations Support System ("OSS"); (2) deployment of long-term number portability; and (3) network rearrangements necessary to expand its network to accommodate projected increases in traffic because of interconnection with competitors. US West has failed to prove that these costs are extraordinary and that these costs are uncompensated by US West's charges for UNEs, collocation, interconnection, and other matters. US West's competitors should not have to bear the costs of multiple state proceedings to show that they are not chargeable with the costs of upgrading US West's network in addition to their own. Once again, US West's attempts to recover these costs in this manner, in multiple forums, whether appropriate or not, have a significant delaying impact on the progress of local competition.[6]

**Points of Interconnection**. With regard to points of interconnection, US West has taken the position that either virtual or physical collocation is required in all rate centers, regardless of whether a carrier already has leased hub facilities in a given rate center. The effect of US West's position is that a carrier such as ICG must rent dedicated space and place equipment in a US West wire center in order to interconnect with the network, even if ICG already has leased hub facilities in a particular rate center. The Act, however, requires only that US West interconnect *at any technically feasible point* in the US West network.[7] Despite the fact that ICG's pre-existing leased hub facilities are considered technically feasible points of interconnection under the Act, ICG is forced to act in accord with US West's position on interconnection in order to interconnect with US West's

[6] This matter is separately pending before this Commission.

[7] 47 U.S.C. § 251(c)(2)(B).

network. Once again, to break the log jam caused by US West's lack of cooperation, ICG was forced to file a complaint on this matter with the Colorado PUC.[8]

**Operations Support System**. US West petitioned the Commission for a waiver of the requirement that it provide its CLEC competitors with access to the OSS, as required under the Commission's Local Competition Order[9], claiming that the attention of its personnel and resources were diverted to matters such as long-term number portability, resale of US West products, unbundling of network elements, and good-faith negotiation with competitors.[10] Despite the fact that the Commission denied US West's request for waiver of providing OSS, however, US West continues to prevent its CLEC competitors from accessing OSS.

US West's Interconnection Mediated Access ("IMA") program accommodates plain old telephone service ("POTs"), but it cannot be used for more complicated orders, such as those for more than one line. As a result, the Colorado PUC has issued a show-cause order to determine whether US West's IMA program complies with the Act, FCC rules, and pertinent PUC directives related to the availability of a long-term solution to access US West's OSS.

---

[8] US West and ICG are currently in settlement talks to reach possible resolution of this dispute.

[9] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 7 FCC Rcd. 15499 (1996).

[10] US West's Petition for Waiver of Operations Support Systems Implementation Requirements, CB Pol. 96-25, Memorandum Opinion and Order (rel. October 23, 1997). Despite its failure yet to have met the OSS requirements, US West seeks now to divert more resources into building Internet backbone.

**Performance Standards**. In its arbitration decision, the Colorado PUC ordered US West to furnish its comeptitors (including ICG) with performance standards, so that a CLEC will have an expectation as to when unbundled network elements or resale orders will be worked by US West. Despite the Colorado PUC's mandate, US West has failed on three separate occasions to supply CLECs with usable performance standards. The Colorado PUC subsequently held that US West had acted in bad faith in these matters.[11]

**Number Portability**. US West has limited the number of phone numbers it will port to 90 numbers per day per switch using interim number portability. ICG, however, has several customers that have requested more than 90 phone numbers as a condition of becoming a local telephone service customer of ICG. This inactivity on the part of US West leads to situations in which a customer may not be able to have all of its lines ported to ICG on the same day.

In addition, US West told ICG that US West will not perform a "coordinated cut."[12] This means that the process of transferring a customer's lines from US West's switch to ICG's switch may not be seamless, which could result in the customer missing important incoming calls. US West has also routinely processed work orders earlier or later than agreed upon, causing ICG's customers to be out of service for hours or even days, and has re-assigned the telephone numbers of ICG customer (rather than simply switching

---

[11] *See* Colorado Public Utilities Commission Decision No. C97-428 in Docket Nos. 96A-356T, 96A-329T and 96A-345T (1997).

[12] A "coordinated cut" is a process by which a US West technician and an ICG technician work together so that a move from US West's switch to ICG's switch will happen simultaneously, thereby causing the least amount of disturbance to the customer.

them over to ICG service) even though those customers had requested that their numbers be ported to ICG.

US West has also refused to allow ICG customers that seek to switch back to US West to keep their numbers, in violation of the Commission's rules and the Act.[13] This leaves the customer with the impression that ICG is holding it and its phone number hostage in order to retain the customer.

US West's actions and inaction with regard to number portability — either alone or in combination — have the effect of leading customers to believe that ICG cannot deliver the service requested, and that the service received by the customer from ICG is poor. Therefore, US West's tactics have tended to encourage customers to stay with the "old reliable local phone company," on the theory that dealing with the CLEC is more trouble than it is worth. This clearly has the effect of discouraging the growth of local competition.

**Discriminatory Practices**. US West has engaged in discriminatory practices with respect to CLECs. ICG itself has documented a number of instances in which US West has promised potential customers quicker installation times and/or better prices if the customers would order service directly from US West instead of from ICG.

In addition, US West requires that CLECs submit a pre-order schematic which must then be approved in an internal US West meeting, but permits IXCs to submit orders without holding such a meeting to approve the order's schematics. The need for such

---

[13] Telephone Number Portability, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking (rel. July 2, 1996); 47 U.S.C. § 251(b)(2).

internal approval by US West causes at least a two week delay for the CLECs, and is clearly a discriminatory tactic. Moreover, US West requires CLECs to forecast port usage even though ports are assigned on a first-come, first-served basis, whereas US West does not require that its large retail customers and IXCs do so.

**Resale**. ICG has received reports from a number of its customers of outages after switching their service from US West to ICG. Since resale orders require only that US West change the name of the billing entity from US West to ICG, there should be *no* activity on a customer's line when any switching of carriers occurs. Moreover, ICG has documented numerous instances in which US West has taken add, change, and repair orders for ICG's resale customers, in direct violation of the interconnection agreement between ICG and US West. The fact that any outages have occurred following a customer's request to switch carriers, combined with the fact that US West has any dealings with ICG's customers at all, may suggest improper activity by US West in dealing with its CLEC competitors. At the very least, ICG is concerned that these outages continue to occur with an attendant impact on local competition.

**Network Reliability**. ICG has received complaints from its customers of both no dial tone and fast busy signals. With the assistance of Lucent Technologies, ICG tested its network and confirmed that the problem was not with either ICG's switch or its interconnection with US West. The problem appeared to be with US West's network. Although ICG worked jointly with US West to try to resolve the issue, US West was not able to determine the cause of the problem, or indicate when the problem would be fixed. ICG notified the Colorado PUC of the problem, and requested the PUC's assistance in resolving the matter. Not surprisingly, once the PUC became involved, US West was quickly able to resolve the problem. Unfortunately, as is the pattern in these situations of foot dragging by US West, US West's resolution of the problem did not occur quickly enough to prevent ICG from losing several customers because of the network "problem."

In addition, US West "accidentally" disconnected one of ICG's 911 trunks for a period of several weeks. Although it is fortunate that none of ICG's customers were affected by the disconnection, the disconnection caused a great deal of uncertainty and inconvenience for ICG, and it had the potential of wreaking havoc on both ICG and its customers.

As shown above, ICG's experiences alone with US West demonstrate that US West has a long way to go before it can legitimately claim to have complied with the Section 251 and 271 mandates of the Act. For this reason, it would not be wise public policy for the Commission to consider US West's request for relief until such time as US West can demonstrate that it has completed it assignment under the Act.

## II. US WEST HAS NOT SHOWN A BASIS FOR GRANTING IT RELIEF

US West's petition for relief is essentially a request for waiver of particular rules in an individual-case situation, although US West does not style its request in this manner.[14]

[14] US West nonetheless structures much of its argument as if it were seeking such a waiver. *See*, for example, *US West Petition* at 4, where US West notes that the relief it seeks is limited and targeted, and *US West Petition* at 5, where US West states that it seeks only the limited regulatory relief necessary to advance the deployment of specific data networking and transmission services in its region. (Emphasis added). ICG notes that other RBOCs

ICG maintains, as outlined below, that US West has not made the requisite showing for the grant of such a waiver. Nor has US West come close to making a case that is compelling enough to warrant forbearing from imposing regulatory restrictions across the entire industry, which is what "forbearance" would accomplish.

As the foregoing "laundry list" illustrates, the would-be competitors of US West have faced considerable obstacles in trying to do business with the RBOC, despite the fact that ICG and others seek to do only what the Act entitles the to do: interconnect with US West's network in a way that will allow them to compete. Whatever air of cooperation US West may foster on occasion is largely undercut by inaction or its outright refusal to act on the particulars of interconnection.

To receive the waiver of the statutory requirements and Commission rules that it seeks, US West must demonstrate good cause for the grant of such relief.[15] The Commission has found good cause to consist of two factors: (1) the underlying purpose of the rule will not be served, or would be frustrated by application in a particular case; and (2) the unique facts and circumstances of a particular case *render application of the rule*

---

have sought similar relief, which would not be required if the relief sought by any one of these petitioners applied across the industry.

[15] If the Commission were to treat US West's petition as one requesting "forbearance" of imposing certain regulatory restrictions under Section 251 and 271 of the Act, then resolution of the petition would be relatively easy. US West has not made a showing that would warrant the Commission's forbearance (under Section 10 of the Act) from imposing certain restrictions for all parties implicated by Section 251 and 271, which would be the consequence of forbearance. Nor can the requisite showing be made by incorporating similar petitions filed by other interested parties.

*inequitable*, unduly burdensome, or otherwise contrary to the public interest.[16] There can be no question but that denial of the waiver is consistent with the Congressional purpose in requiring compliance with Section 251. As for the second factor, the Commission can consider equities to a particular party in deciding whether to grant a waiver.[17] In its evaluation of special circumstances in a particular instance, the Commission may look to considerations of equity. In its petition, US West has advanced no affirmative equitable grounds upon which grant of a waiver would be appropriate. Nor has it shown that a denial of relief would be inequitable.[18]

It is on equitable grounds, in particular, that US West has not only failed to carry its burden of demonstrating compliance with Section 251, but does not appear to have tried to comply fully, given the evidence outlined above. Certainly, it is axiomatic that merit badges and gold stars are given only to those who successfully *complete* and achieve the highest scores on their assignment. Currently, to continue the analogy, US West is in no position even to be graded on it performance under Sections 251 or 271, let alone receive the special recognition for its performance that a grant of a waiver would signify. Instead, US West needs to be sent back to work with a message that its assignment is long overdue. The Commission and US West's would-be competitors continue to wait.

---

[16] *See* 47 C.F.R. § 22.19(a)(i)-(ii).

[17] *See* Telerama, Inc. v. FCC, 419 F. 2d 1047 (6th Cir. 1969); United Television Co. v. FCC, 514 F. 2d 279, 282 (D.C. Cir. 1975).

[18] Here, grant of US West's petition would be inequitable to the parties who have complied with the provisions of Section 251, while US West has not. "[F]undamental fairness to those who comply with the provisions of this rule mandates stringent compliance." Florida Cellular Mobil Communications Corp. v. FCC, 28 F. 3d 191, 198 (D.C. Cir. 1994).

* * * * *

As discussed above, Section 271 gives the Commission invaluable tool to ensure that the RBOCs take all of the steps required by Section 251 to make local competition a reality, not just an aspiration. ICG's experiences with US West richly demonstrate the necessity of the Commission keeping a vigilant eye on what transpires at ground zero in US West's region, as well poking and prodding the RBOC along the way. Section 271 provides much of the prod, and it should not be tossed aside for *any* interLATA provision of service, no matter how "targeted and limited," particularly in the absence of a showing of unmet needs. Therefore, because US West has not made a showing that it is complying with the requirements of the Act, particularly in the face of contrary evidence submitted by ICG, the Commission should deny the relief sought by US West in its petition.

Respectfully submitted,

Albert H. Kramer
Michael Carowitz
Valerie M. Furman
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for ICG Telecom Group, Inc.

Cindy Z. Schonhaut
Senior Vice President of Government
Affairs and External Affairs
ICG Communications, Inc.
161 Inverness Drive
Englewood, CO 80112

Dated: April 6, 1998

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 1998, a copy of the foregoing Comments of the ICG Telecom Group, Inc. was sent by first class United States mail, postage prepaid, to the following:

William T. Lake
John H. Harwood, II
Jonathan L. Frankel
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, DC 20554

Dan L. Poole
Robert B. McKenna
Jeffry A. Bruggerman
US West, Inc.
1020 19th Street, NW
Washington, DC 20036

ITS
1231 20th Street, NW
Washington, DC 20037

Valerie M. Furman